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Supreme Court of the United States

OCTOBER TERM, 1952

No. 502

ATLANTIC COAST LINE RAILROAD COMPANY,
PETITIONER AND APPELLANT BELOW,
versus
THE STATE OF SOUTH CAROLINA, EX RELATIONE THE PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA, AND CHARLES A. RICE, J. C. DARBY, JOHN G. CONEY, WINCHESTER SMITH, F. B. HINES, EDWARD WIMBERLY, AND RUFUS M. NEWTON, AS MEMBERS OF AND CONSTITUTING THE PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA, AND JOHN M. DANIEL, AS ATTORNEY GENERAL OF SOUTH CAROLINA, AND THE CITY OF CHARLESTON, RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

BRIEF OF RESPONDENTS IN OPPOSITION

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OPINION BELOW

The opinion of the Supreme Court of South Carolina is reported at *The State of South Carolina ex relatione Public Service Commission et al. v. Atlantic Coast Line Railroad Co. et al.*, 72 S. E. (2d) 438.

JURISDICTION

The judgment of the Supreme Court of South Carolina was entered on September 5, 1952, and rehearing denied on September 25, 1952. The petition for a writ of certiorari was filed on December 12, 1952, and a copy thereof was served on counsel for the respondents on December 17, 1952. The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1257 (3).

QUESTIONS PRESENTED

1. Whether the approval of the Interstate Commerce Commission was a prerequisite to the validity of the action of the Public Service Commission of South Carolina requiring the restoration by the petitioner and the Southern Railway Company of passenger station facilities at the point and on the premises at which the burned station was located.

2. Whether the order of the Public Service Commission of South Carolina was arbitrary and unreasonable, amounting to a denial of due process, or cast an undue burden on interstate commerce.

3. Whether the portion of the order of the Public Service Commission of South Carolina providing that the petitioner and the Southern Railway Company inaugurate passenger train service to and from the restored passenger station facilities when restoration was completed was invalid.

STATUTES AND REGULATIONS INVOLVED

The applicable State statutes and regulations are printed in the Appendix to this Brief, *infra*, pp. i——. The applicable Federal statutes are printed in the Appendix to the petitioner's Brief.

STATEMENT

On January 10, 1947, the Charleston Union Station, located at Columbus and Bay Streets in the city of Charleston, South Carolina, was partially destroyed by fire, the destruction including the portion of the station building devoted to the accommodation of passengers, the sale of tickets, and the handling of baggage.

This station constituted the only passenger station facilities afforded by the petitioner, Atlantic Coast Line Railroad Company, and by the Southern Railway Company, in the city of Charleston at the time of the fire, and it had been so used by them for approximately 40 years prior thereto.

On June 14, 1950, the Public Service Commission of South Carolina, in a proceeding (hereinafter referred to) instituted before it by the city of Charleston, made an order directing the petitioner and the Southern Railway Company to rebuild their passenger station building on the site of the station building which burned on January 10, 1947, and thereafter to inaugurate passenger train service thereto and therefrom.

On November 20, 1950, the Public Service Commission and others instituted a proceeding in the Court of Common Pleas for Charleston County, South Carolina, under Section 8341 of the Code of Laws of South Carolina (1942), for the issuance of a writ of mandamus requiring the petitioner and the Southern Railway Company to comply with the Commission's order. From the judgment entered by that Court on February 10, 1951, granting the writ, the petitioner and the Southern Railway Company appealed to the Supreme Court of South Carolina, which Court, on September 5, 1952, affirmed the judgment.

The Charleston Union Station was constructed in 1907, and since then maintained and operated, by the Charleston

Union Station Company, the jointly owned agency and instrumentality of the petitioner and the Southern Railway Company. The Charleston Union Station Company was a corporation created by Act No. 625 of the Acts of the General Assembly of South Carolina of 1902 (23 S. C. Stats. at Large 1168)

> "for the purpose of constructing, maintaining and operating a Union Passenger Station in the City of Charleston, South Carolina, and to that end to acquire by purchase, lease, condemnation as hereinafter provided, or otherwise, any and all property that may be necessary for the construction, maintenance and operation thereof in said city, and by such name **to have all the general powers, and be subject to all the general restrictions, given and imposed by the laws of this State upon railroad corporations.**" (Emphasis added.)

Under date of January 1, 1907, the petitioner and the Southern Railway Company, as an essential and integral part of their joint station project, entered into a trackage agreement whereby the petitioner granted to the Southern Railway Company

> "the right to use conjointly with the Coast Line Company the line of double track railway of the Coast Line Company between the connection (which it is hereby agreed may be made by the Southern Company) of the said line of the Coast Line Company with the line of the Southern Company * * * to a connection with the track to be constructed by the Charleston Union Station Company * * * all in the City of Charleston, State of South Carolina, being a distance of seven thousand six hundred (7,600) feet * * * **for the purpose of running thereon the passenger trains and passenger engines of the Southern Company** * * *." (R. 503.) (Emphasis added.)

The agreement recited that the petitioner and the Southern Railway Company "have caused to be organized **in their joint interest** a corporation in the State of South

Carolina of the name of Charleston Union Station Company, for the purpose of constructing and operating a passenger terminal and Union Station in the City of Charleston, South Carolina, **which will be used in common** by the parties hereto * * *." (R. 501, **et seq.**) (Emphasis added.)

Under date of January 1, 1911, the petitioner and the Southern Railway Company agreed in writing that the "Southern Company" should have the right to use the "Coast Line Company's" "Y" track near the Union Station building, by which passenger trains were backed into the station (R. 522), and under date of March 8, 1916, an agreement supplementary to the trackage agreement of January 1, 1907, extended the "Southern Company's" right to use the double tracks of the "Coast Line Company" to a point approximately 3,887 feet North of the original connection between the lines of the two companies (R. 513, 515).

In 1914 the Seaboard Air Line Railway Company came into Charleston, and used the facilities of the station until 1930, when it was authorized by the Public Service Commission (then called the Railroad Commission of South Carolina) to provide and use its own passenger station on Grove Stret (R. 17, 482).

On June 30, 1937, the Public Service Commission, pursuant to Section 8292-12 of the Code of Laws of South Carolina (1942) under which it has the general supervision of all railroads and railways in the State and the duty of enforcing compliance by them with their charters and the laws of the State, promulgated and filed with the Secretary of State of South Carolina its Rule 14, which provided:

> "Each and every depot, flag stop, station, office and agency, now maintained, conducted or used in South Carolina by any railroad * * * doing business in this State, for the transaction of business with

> the public **is hereby formally established and located at the point and on the premises** where the same is now being maintained and conducted. No such depot, flag stop, station or agency, as aforesaid, now established, or that hereafter may be established, pursuant to orders made by the Commission, or voluntarily by such company, or otherwise, shall be closed, removed, suspended, discontinued, or abolished without authority granted by the Public Service Commission. * * *'' (Emphasis added.)

Under Rule 14, notice is required to be given to the public for 30 days before an application for authority to close, remove, suspend, discontinue or abolish a depot or station may be made to the Public Service Commission.

The Charleston Union Station Company received $158,366.00 from fire insurance sources in settlement of losses sustained in the fire, which, however, has not been used to replace any portion of the damaged station building. Instead, the petitioner and the Southern entered into negotiations with the authorities of the city of Charleston looking to the re-establishment of suitable passenger station facilities for the city and its residents and the travelling public generally.

At the time of the fire the Southern was operating trains 11 and 12 and trains 27 and 28 into and out of Charleston, trains 11 and 12 running between Charleston and Columbia and trains 27 and 28 running between Charleston and the middle west. These trains either originated or terminated at the station as the terminus.

At that time the petitioner Atlantic Coast Line was operating trains 52 and 53, trains 77 and 78, and trains 80 and 89 into and out of Charleston, trains 52 and 53 running between Charleston and Sumter, trains 77 and 78 (The Palmetto Limited) running between Savannah, Ga., and Richmond, Va., and trains 80 and 89 running between Charleston and Richmond, Va.

Some years prior to the fire the appellant Atlantic Coast Line Railroad Company had established a passenger station near North Charleston, an unincorporated community, approximately six miles North of the limits of the City of Charleston, which it called the North Station. This station was located on the double tracks of the Atlantic Coast Line running from Richmond, Va., to Florida, and near the point where such tracks crossed the Ashley River. The Atlantic Coast Line stopped certain of its through trains which did not run into the City of Charleston, but all of the Atlantic Coast Line trains which therefore ran into the city continued to operate to and use the Charleston Union Station. They ran to and from the city on the double tracks mentioned in the trackage agreements referred to above.

Immediately after the fire, the petitioner Atlantic Coast Line began to use its North Station for the trains formerly operating to and from the Union Station, and the Southern Railway Company provided old railroad passenger coaches at a point on Line Street in the city of Charleston to serve as a passenger station, operating thereto and therefrom the passenger trains formerly using the Charleston Union Station.

No formal authority was sought or obtained by either of them from the Public Service Commission of South Carolina or from the Interstate Commerce Commission for such changes in operation. Representatives of the petitioner and of the Southern merely conferred informally with members of the Public Service Commission, apprising them of the dispositions being made as a result of the fire, and the Commission stated that the proposed arrangement was entirely satisfactory, "and to continue in effect until some definite agreement was reached in connection with permanent facilities" (R. 457).

In the negotiations with the city, the petitioner Atlantic Coast Line proposed to develop its North Station further and use it as a passenger station for the city of Charleston, while the Southern proposed to provide a station for its passenger purposes on Ann Street in the city. These proposals were rejected by the city authorities. In August, 1949, the City of Charleston filed its petition with the Public Service Commission, complaining of:

(a) The action of the petitioner Atlantic Coast Line in transferring all of its passenger depot facilities to the Charleston North Station, some miles removed from the city, thus necessitating passage by taxi or private motor vehicle to and from the city, unless passengers resort to the use of a shuttle-bus, employed by the company, between the North Station and the City Market, at the cost of additional travel time and the general inconvenience of the public;

(b) The action of the Southern in locating its present passenger depot on Line Street, with only a renovated railroad coach as ticket office; and

(c) The continued delay and inaction of the two companies in providing within the city a suitable Union Station or separate suitable passenger depots, although there is available for that purpose the site of the former Charleston Union Station, which formerly was used jointly by the companies, where tracks, well removed from the center of the city, are in place and where the convenience, safety and necessity of the public would be properly met (R. 5).

The petitioner and the Southern filed separate motions to dismiss, which challenged the Commission's jurisdiction of the subject-matter of the petition, and also answered the City's petition.

The Southern's answer denied that it has refused since the fire "to provide its own station or join, under appropriate conditions, in negotiations for a Union Station" (R. 7).

It also alleged that there "is no necessity for a Union Station at Charleston insofar as the passenger travel of Southern Railway Company is concerned," but that despite such lack of necessity it had signified its willingness to join in consideration thereof if certain conditions were met (R. 11), these conditions having to do with access by the Southern to the vicinity of the Coast Line's Columbus Street yard and the availability of property there suitable and sufficient to enable the Southern to locate satisfactory yard, shop and other facilities thereon (R. 561).

The petitioner's answer denied that the public had been inconvenienced or has spent additional travel time in reaching its facilities at "Charleston North Station" (R. 13); alleged that "so far as interchange of passengers between the railroad lines at Charleston, South Carolina, is concerned, no necessity exists for the construction of a union passenger terminal"; and also alleged that, in view of the decline of passenger travel to and from Charleston since World War II because of other forms of transportation, it "has been and will continue to be able to adequately serve all passengers with the present facilities at the Charleston North Station, and * * * believes and therefore avers that no justification now exists for the construction of additional passenger station facilities at Charleston, with the expense incident thereto" (R. 14).

The Commission held hearings on the matter, and the parties introduced evidence. During the hearings it developed that the petitioner and the Southern Railway Company (without authority from any regulatory commission) had executed an agreement between themselves which purpored to terminate the trackage agreement of January 1, 1907, and the agreements supplementary thereto, the instrument so executed reciting that "the Charleston Union Station Company has elected not to rebuild the said passenger

station, and the joint use by the Southern Company of certain trackage of the Coast Line Company in connection with the joint use of said passenger station **is no longer necessary or required** by the Southern Company * * *" (Exhibit 55, R. 529.) (Emphasis added.)

On June 14, 1950, the Commission filed its order, in which it found: (1) that there is need in the City of Charleston for adequate and suitable passenger terminal facilities for the handling of passenger train traffic moving to, from or through the city via the two railroad companies; (2) that rebuilding of the Charleston Union Station and the resumption of passenger station operation to and from that station via the two railroad companies will reasonable satisfy the need found to exist; and (3) that an order directing and requiring the two railroad companies to forthwith rebuild their passenger station in Charleston on the site of the station building which burned January 10, 1947, and thereafter inaugurate passenger train service thereto and therefrom, should be entered.

The Commission's Order No. 7271, compliance with which is sought by the respondents in this proceeding, was entered in accordance with such findings (R. 29-30).

The petitioner and the Southern did not comply with the order, nor did they file the monthly reports required by it. Instead, they each commenced an action in the United States District Court for the Eastern District of South Carolina, seeking injunctions, both interlocutory and permanent, to prevent the enforcement of the order as being null, void, and of no effect. A special court of three judges was ordered to be convened to hear the actions on November 21, 1950.

On November 20, 1950, the respondents filed in the Court of Common Pleas for Charleston County a petition under Section 8341 of the Code of Laws of South Carolina

(1942) praying that a writ of mandamus be issued under that section requiring the appellants to comply with the Commissioner's order. Circuit Judge Martin, presiding judge of the Ninth Judicial Circuit, ordered the appellants to show cause before him on December 11, 1950, why the prayer of the petition should not be granted, and in his order stayed and enjoined the enforcement of the Commission's order pending the determination of the proceeding and for a like period after the expiration of the twelve months period prescribed in the Commission's order for compliance therewith (R. 87).

The District Court of three Judges thereupon by appropriate orders stayed the actions brought by the petitioner and the Southern in the U. S. District Court, in conformity with 28 U. S. C., section 2284.

The petitioner Atlantic Coast Line Railroad Company moved before Judge Martin for an order vacating or modifying the order to show cause, on grounds which, *inter alia*, challenged the right of the respondents to have the enforcement of the Commission's order stayed and enjoined since no irreparable injury to them is alleged (R. 89).

The Circuit Court, by order dated November 22, 1950, overruled the motion.

The appellants thereafter filed separate returns to the petition and rule to show cause, and the respondents traversed various allegations therein.

The petitioner and the Southern Railway Company, in their returns, challenged the jurisdiction of the Commission to require the rebuilding of the station without first obtaining the approval of the Interstate Commerce Commission, and also contended that the order was invalid as being arbitrary and unreasonable, amounting to a denial of due process of law and equal protection of the laws, and as casting an undue burden on interstate commerce.

The matter was heard by Circuit Judge Martin on December 11, 1950, pursuant to the rule to show cause, and the parties introduced in evidence the record of the proceedings before the Public Service Commission, and also additional evidence by way of affidavits. Such additional evidence included evidence by both parties in reference to the cost of construction involved in restoring the burned station, as to which neither of the parties had offered any evidence in the hearings before the Public Service Commission.

On February 10, 1951, Judge Martin filed his order granting the relief sought by the respondents under Section 8341, and his order was affirmed and adopted by the Supreme Court of South Carolina as its judgment on the issues presented by the petition for a writ of certiorari.

SUMMARY OF THE ARGUMENT

Point 1. The Public Service Commission of South Carolina was empowered to make its order requiring the restoration of passenger station facilities at the point and on the premises at which the burned station was located. The approval of the Interstate Commerce Commission was not a prerequisite to the validity of its action, no new trackage agreement or extension of lines being necessary to compliance by the railroad companies with the order.

Point 2. The finding of the Public Service Commission of South Carolina, and of the State Court, that the restoration of passenger station facilities at the point and on the premises at which the burned station was located is necessary to afford suitable passenger station service in the city of Charleston is fully supported by the evidence. The Commission's order was not arbitrary or unreasonable, and the mere fact that the operation of the station may not be profitable by itself does not constitute a confiscation of the

property of the petitioner, or unduly burden interstate commerce.

Point 3. The provision in the order of the Public Service Commission of South Carolina that passenger train service be inaugurated to and from the restored station merely stated a legal incident of the re-activation of the station after its restoration for use as such.

ARGUMENT

Point 1. The Public Service Commission of South Carolina was empowered to make its order requiring the restoration of passenger station facilities at the point and on the premises at which the burned station was located. The approval of the Interstate Commerce Commission was not a prerequisite to the validity of its action, no new trackage agreement or extension of lines being necessary to compliance by the railroad companies with the order.

The petitioner suggests that a conflict of jurisdiction between the Public Service Commission of South Carolina and the Interstate Commerce Commission is present in the instant case.

It contends (a) that under the "so-called Los Angeles Passenger Station case" a certificate of approval by the Interstate Commerce Commission is a condition precedent to the validity of the State Commission's order that the two railroad companies restore passenger station facilities at the location of the burned station; (b) that the voluntary termination by the two railroad companies of the trackage agreements between them existing at the time of the fire was effectual, despite the State Commission's Rule 14, because the Interstate Commerce Commission's power to approve new trackage agreements, and because operations under trackage agreements may not be validly abandoned without the approval of that commission; and (c)

that accordingly either an extension of lines by the Southern Railway Company, or a new trackage agreement between that company and the petitioner for the use of the tracks of the latter, is necessary for the Southern's trains to operate to and from the station, requiring prior approval by the Interstate Commerce Commission.

It is respectfully submitted that the Los Angeles cases do not have the effect contended for by the petitioner. Instead, they support the action of the State Commission and the judgment of the State court in the instant case.

In the first of the Los Angeles cases, *Railroad Commission v. Southern Pacific Co. et al.*, 264 U. S. 331, the State Commission ordered the three railroad companies involved to build a new interstate union depot in the City of Los Angeles. Compliance with the order required the joint use of land, tracks and terminal facilities, and the abandonment of three existing passenger stations as such, together with substantial extension, relocation and abandonment of existing trackage, all at vast cost to the railroad companies. This Court affirmed the decision of the State Supreme Court that the order was beyond the power of the State Commission under Sections 1 (18) and 1 (21) of the Interstate Commerce Act, 49 U. S. C., sections 1 (18) and 1 (21). In its opinion **this Court drew a distinction between depots such as that there under consideration and "local union stations," saying that the differences "are more than that of mere degree; they and their consequences are so marked as to constitute a change in kind.** They come within paragraphs 18 to 21 of section 402 and require a certificate of the Interstate Commerce Commission as a condition precedent to the validity of any action by the carriers or of any order by the State Commission." (p. 346 of 264 U. S.) (Emphasis added.)

In the second case, *Interstate Commerce Commission v. United States ex rel. Los Angeles*, 280 U. S. 52, this Court

held that the Interstate Commerce Commission was not given the power, by the Congressional legislation under consideration, to order the construction of the Los Angeles union depot.

In the third case, *Atchison, T. & S. F. Ry. Co. v. Railroad Commission,* 283 U. S. 380, this Court upheld the validity of the order of the State Commission requiring the carriers to build the Los Angeles union depot. With reference to *Railroad Commission v. Southern Pacific Co. et al., supra,* 264 U. S. 331, this Court said:

> "The Court held that the relocation of tracks, which was incidental to the proposed union station, required a certificate of approval of the Interstate Commerce Commission under paragraphs 18 to 21 of section 1 of the Interstate Commerce Act, as amended by the Transportation Act of 1920 (41 Stat. 476-478), as a condition precedent to the validity of any action by the carriers or of any order by the State Railroad Commission." (p. 387 of 283 U. S.)

This Court, in upholding the State Commission's order, recognized the principle that the State, directly or through an authorized commission, may require railroad companies to provide reasonably adequate and suitable facilities for the convenience of the communities served by them, and that railroads may be compelled by State legislation to establish stations at proper places for the convenience of their patrons, including union stations. (pp. 394, 395 of 283 U. S.)

The station involved in the instant case differed in kind from that considered in the Los Angeles cases. The original establishment and construction of a new Union Station is not here involved. Compliance with the Public Service Commission's order does not necessitate the extension, relocation or abandonment of any trackage, for the trackage by which the Charleston Union Station was

reached and used by the petitioner and the Southern Railway Company for approximately 40 years is intact and in place for the resumption of the passenger train service thereto and therefrom which was interrupted by the fire damage to the station.

The order merely required the restoration of passenger station facilities and services at the point and on the premises formally established by the Public Service Commission's Rule 14 as the proper location for the convenience of the public in the city of Charleston, authority to discontinue or abandon which location the petitioner and the Southern had neither obtained nor sought from the State Commission in the manner prescribed by the Rule.

When the petitioner says that the fire, rather than the railroad companies, abandoned the station, it overlooks the fact that Rule 14 deals with the proper location of their passenger station (as originally selected by them and formally established by the Rule on June 30, 1937), and not with the physical structure. In effect, the Rule made the point and the premises on which the burned station was located *prima facie* the proper location of the station, with the burden upon the railroad companies of making application to the Public Service Commission, after public notice, for authority to close, remove, suspend, discontinue or abandon the same. The requirements of the Rule are reasonable and valid. *Minneapolis & St. Louis Railroad Co. v. Minnesota,* 193 U. S. 53, 63; *Western & Atlantic Railroad v. Georgia Public Service Commission,* 267 U. S. 493, 496; *Atchison, T. & S. F. Ry. Co. v. Railroad Commission, supra,* 283 U. S. 380, 394, 395.

In *Minneapolis & St. Louis Railroad Co. v. Minnesota, supra,* at page 63 of 193 U. S., this Court held:

> "To establish stations at proper places is the first duty of a railroad company. The State can certainly provide for the enforcement of that duty. An incor-

porated village might be said to be such a place without an express declaration of the statute. To make it *prima facie* so by statute and to impose the burden of meeting the presumption thence arising certainly does not amount to an invasion of the rights of property or an unreasonable control of property."

The Public Service Commission and the State Court held that the trackage agreement between the petitioner and the Southern Railroad Company at the time of the fire was a necessary incident to the maintenance and operation of the station as jointly established by the two railroad companies for their use "in common" (R. 502), and was an integral part of the arrangement under which it was established and used by them. This Court has recognized that "trackage agreements like leases of railroad tracks and facilities are means by which railroad systems have been assembled." *Thompson v. Texas Mexican Ry. Co.*, 328 U. S. 134, 142, 143.

The State Court held that the trackage agreement, as an integral part of the station apparatus, as established, operated and used by the two railroad companies, could not be voluntarily terminated by them without authority of the Public Service Commission under Rule 14, and that the attempted termination without such authority was invalid and of no effect. Hence the trackage agreement remains of force; the parties will operate under it, after the station is restored, just as they did for approximately 40 years prior to the fire; and no new trackage agreement, nor any extension of lines, calling for the exercise of its jurisdiction by the Interstate Commerce Commission, will be necessary.

The petitioner in its Brief (p. 11) says that "The trackage agreement was cancelled pursuant to its terms." But the trackage agreement by its terms remains effective during the life of any contract between the Charleston

Union Station Company and the two railroad companies for their joint use of the station (R. 507, 510). Apparently because of this fact, they recited in the termination agreement that the Charleston Union Station Company (their jointly owned agency and instrumentality, itself subject by the Act which created it to "all the general restrictions, given and imposed by the laws of this State upon railroad corporations," which, of course, included the provisions of Rule 14 of the Commission) *had elected* not to rebuild the station after the fire (R. 529). It would seem that the trackage agreement was cancelled because their jointly owned Charleston Union Station Company "had elected", without authority from the Public Service Commission, not to rebuild, and hence to abandon and discontinue, the station; in other words, the cancellation was predicated upon the unauthorized and unlawful action of the jointly owned agency of the two companies.

It is respectfully submitted that the only reasonable inference from the record before the Public Service Commission and the State Court is that the termination of the trackage agreement was a step in concerted action on the part of the two railroad companies to discontinue and site at Columbus and Bay Streets as the location of their passenger station service in the City of Charleston, the provisions of Rule 14 and of 49 U. S. C., section 1 (18) (as to the abandonment of operations) to the contrary notwithstanding.

The petitioner has not pointed to any provision in the Federal legislation which gives the two railroad companies the right voluntarily to terminate the trackage agreement despite the provisions of Rule 14.

It advances the argument that the State's right to regulate the termination of the trackage agreement (as an essential element of the establishment, use and continued

operation of the station) no longer exists because of Federal legislation providing for the authorization of new trackage agreements by the Interstate Commerce Commission, 49 U. S. C., section 5(2)(a)(ii), and that carriers may not validly abandon operations (including operations under trackage agreements) without a certificate from the Interstate Commerce Commission, 49 U. S. C., section 1(18).

But nothing in this legislation evidences an intent on the part of the Congress to relieve carriers from existing State regulations as to the termination of trackage agreements essential to the continuing operation of a passenger station, certainly where authority from the Interstate Commerce Commission to abandon operations under the trackage agreement has not been sought and obtained.

The action of the Public Service Commission in the instant case did not invade the field of jurisdiction given by law to the Interstate Commerce Commission; such action was a proper exercise of the right of the State to require the railroad companies to furnish reasonably adequate and suitable passenger station service at a proper and formally established place; and it is respectfully submitted that the State Court did not err in holding that the Public Service Commission's order was within the limits of its authority and valid.

Point 2. The finding of the Public Service Commission of South Carolina, and of the State Court, that the restoration of passenger station facilities at the point and on the premises at which the burned station was located is necessary to afford suitable passenger station service in the city of Charleston is fully supported by the evidence. The Commission's order was not arbitrary or unreasonable, and the mere fact that the operation of the station may not be profitable by itself does not constitue a confiscation of the property of the petitioner, or unduly burden interstate commerce.

The petitioner also challenges the validity of the order of the Public Service Commission as being arbitrary and unreasonable, amounting to a denial of due process of law, and also as casting an undue burden on interstate commerce.

It first says that compliance with the order will cost money in building passenger station facilities at Columbus and Bay Streets, and that "That money would have to come out of the carriers' revenues as of today." (Petitioner's Brief, p. 12.)

No evidence as to the cost of restoring the station was offered in the hearings before the Public Service Commission, but both sides offered evidence on this issue in the hearing in the Court of Common Pleas before Circuit Judge Martin.

The estimates of the two railroad companies ran from $400,000.00 to $800,000.00 to rebuild the station as it stood before the fire. The evidence offered by the respondents showed that the rebuilding of the station as it was before the fire would cost approximately $280,000.00; its rebuilding without waste space approximately $200,000.00; its rebuilding without the second floor railroad company offices approximately $125,000.00; and that a building such as that provided by the petitioner at its North Station would cost approximately $50,000.00 to build.

The State Court held:

> "The Commission's order may not reasonably be construed to contemplate exact duplication in detail of the 1907 station structure. The Commission was dealing with passenger facilities, and **the evidence shows that a suitable station for that purpose of modern design and construction can be provided on the site of the burned station for not in excess of the amount of insurance received on account of the fire damage.** The order does not require the perpetuation

of waste space, antiquated architecture, and features not essential to proper passenger service." (R. 140.) (Emphasis added.)

The railroad companies are protected by the insurance money from having to go into their revenues to comply with the order.

The petitioner also says that it is unreasonable to require the restoration of passenger station facilities in the City of Charleston, because it has its North Station (some six miles distant from the city limits and in an unincorporated area) which can be used by persons travelling to and from the city. The Commission found on the evidence that the North Station of the petitioner, with a shuttle-bus operated by the petitioner from that point to the City Market (having no passenger station facilities), does not constitute a satisfactory performance of the petitioner's duty to render passenger station service in the City of Charleston, and that the interim lack of passenger station facilities in the city had adversely affected passenger traffic since the fire, as shown below.

Moreover, the location of the Charleston Union Station continues to be the proper location formally established under the Commission's Rule 14, and no authority has been obtained or sought by the petitioner or by the Southern Railway Company either to discontinue the station at that location, or to abandon the operation to that point of the trains now in service which operated thereto and therefrom prior to the fire.

Under the evidence and all the circumstances, the Commission's order cannot be said to be unreasonable because the petitioner has its North Station in operation approximately six miles out of the city.

The two railroad companies also offered evidence that the Charleston Union Station operated at a loss, but their

witnesses also admitted that union stations "are all operated at a loss," and that in this respect the Charleston Union Station "wasn't any different from any other Union Station over the Southern or the Coast Line." (R. 249.)

The evidence also showed that there is little interchange of passengers between the lines of the two railroad companies at Charleston, but, as pointed out in the opinion of the State Court, there was no evidence that there was ever any substantial interchange of passengers between their lines, or that they originally established the station for their joint use with a view to passenger interchange. In reality the station was a joint station rather than a union station.

The Southern offered evidence that it could reduce its operating costs by making up its trains on its own tracks instead of having to bring its engines to the Union Station to pick up its trains; but the evidence also showed that the Southern "had no objection to the Union Station before it burned," and "no considered plans for pulling out of it ever." (R. 347.)

The petitioner contended that use by it of the North Station alone would save time and expense involved in train operation into and out of the City of Charleston; but the Commission's order did not contemplate that the petitioner would do more than resume the train operations into and out of Charleston that were interrupted by the fire damage to the station, and therefore did not cause an increase in the time and expense elements referred to.

The two railroad companies offered evidence that there has been a sharp reduction in passenger traffic into and out of Charleston since the fire, in consequence of which the Southern was authorized by the Public Service Commission in July, 1950 (after the issuance of its order here

under consideration), to discontinue its intrastate trains 11 and 12, and the petitioner was likewise authorized in the same month to discontinue its intrastate trains 52 and 53. Earlier, and after the fire, the petitioner obtained authority from the Interstate Commerce Commission to operate its interstate trains 80 and 89 from Richmond, Va., to and from Florence, S. C., as their southern terminus, although their southern terminus prior to the fire was Charleston.

The Public Service Commission recognized, of course, that the discontinuance of the intrastate trains referred to had the effect of transferring intrastate passenger travel to the interstate trains of the two railroad companies, as is evidenced by the provision in the Commission's order authorizing the discontinuance of Southern trains 11 and 12 which required, as a condition thereof, the rearrangement of the schedules of its interstate trains 27 and 28 to serve the cities, towns and communities in South Carolina previously served by trains 11 and 12 (R. 576). Intrastate passenger train service by the two railroad companies, and the need therefor, did not disappear; it was merely shifted to their interstate trains.

The evidence showed that whereas the Southern sold 24,746 passenger tickets in its city ticket office and depot ticket office at Charleston in 1946, there was a sharp decrease after the fire, as follows: 1947, 13,669; 1948, 9,954; 11 months of 1949, 7,957. Total revenues of all participating carriers derived from such ticket sales in 1946 was $454,918.70. In 1947, it was $187,789.62; in 1948, $129,197.20; and in 11 months of 1949, $82,146.30. (R. 463, 464.) The petitioner offered no similar figures, and it is fair to infer that they would have shown no different result.

These figures, and the necessity of discontinuing so many trains formerly operating to the Charleston Union

Station, taken together with the evidence as to the inadequate station facilities furnished by the Southern on Line Street since the fire, and the evidence as to the inadequate passenger service rendered by the petitioner by means of its North Station and its shuttle bus service from the station to the City Market (which has no passenger station conveniences of anything like the usual kind), justified the conclusion that the sharp reduction in passenger travel since the fire resulted at least in large part from the fact that the Union Station has been out of service, and that its restoration to service will fill a public need formerly served, which has been forced elsewhere during the period of delay in the resumption of passenger train service to and from the city. The need for the train service exists, and will again be filled by the railroad companies when they resnme suitable and convenient passenger station and train service to the community.

The evidence before the Commission and the State Court showed that Charleston, a city of over 70,000 population, which had enjoyed passenger station and train service at the Charleston Union Station location for approximately 40 years prior to the fire, needs the resumption of that service, and that the public will be convenienced thereby.

The evidence also showed that the Southern's proposed Ann Street Station would tend to perpetuate that company's operations in the heart of the city, and would increase traffic disruption by the operation of passenger trains across heavily travelled city streets not now crossed by passenger trains; and that the proposed North Station service of the petitioner is far less adequate than the public travelling to and from the City of Charleston is entitled to.

The decisions of this Court cited in the opinion of the State Court show that the question in each case such as

the instant one "is whether, in the light of the facts disclosed, the regulation is essentially an unreasonable one," and that the matter of expense is "an important criteria to be taken into view in determining the reasonableness of the order," *Atchison, T. & S. F. Ry. Co. v. Railroad Commission, supra,* 283 U. S. 380, 396. But the fact that the operation will entail losses is not conclusive of the question. *Western & Atlantic Railroad v. Georgia Public Service Commission, supra,* 267 U. S. 493, 496; *Fort Smith Light & Traction Co. v. Bourland et al.,* 267 U. S. 330, 332; *Missouri Pacific Ry. Co. v. Kansas,* 216 U. S. 262, 279; *Chesapeake & Ohio Ry. Co. v. Public Service Commission,* 242 U. S. 603, 607.

The State Court properly held that the petitioner and the Southern Railway Company have franchises which include the duty of furnishing adequate and suitable passenger service and facilities, and "the Constitution does not confer upon the company the right to continue to enjoy the franchise or indeterminate permit and escape from the burdens incident to its use." *Fort Smith Light & Traction Co. v. Bourland et al., supra,* at page 333 of 267 U. S.

In *People of the State of New York ex rel. New York & Queens Gas Co. v. McCall et al., Commissioners,* 245 U. S. 245, 351, this Court observed:

> "Corporations which devote their property to a public use may not pick and choose, serving only the portions of the territory covered by their franchises which it is presently profitable for them to serve and restricting the development of the remaining portions by leaving their inhabitants in discomfort without the service which they alone can render."

And it may not be amiss to quote the following from *State ex rel. Railroad & Warehouse Commission v. Northern Pacific Ry. Co.,* 90 Minn. 277, 96 N. W. 81, 82:

"It would seem to be now settled, upon principles of public policy, that the decisive question in such a case should not be the convenience and benefit of railway companies alone. They undoubtedly have a right to consider their own profit and convenience largely, but also owe duties to the public, for which reasons they have been permitted to establish their roads, and enjoy many substantial privileges depending upon benefits which will accrue to patrons adjacent to their lines, and incidental to the obligations thus imposed must be the duty to treat the public fairly, and furnish them with reasonable facilities to enjoy the benefits they confer; hence the discontinuance of an established railway station which their patrons have been permitted to use for years, upon the faith of whose location the people of a village and the surrounding country have depended, cannot be determined solely by the consideration whether a railway station is profitable to the road, nor upon its convenience and the adaptation of its affairs to the increased advantages and methods of transacting its business, nor by the test whether the continuance of a station will require it to incur expense. This wholesome conclusion is supported by authority, and is founded upon equity and reasonable grounds of general utility."

As to the petitioner's contention that the Public Service Commission's order casts an undue burden on interstate commerce, it has already been pointed out that the cost of construction required to comply with the order will not burden the revenues of the two railroad companies, because such cost will not exceed the insurance money received by the Charleston Union Station Company on account of the fire damage.

It has also been pointed out that neither railroad company has made application to any regulatory commission for authority to abandon the station location, or to abandon the operation of their trains thereto and therefrom which were so operating prior to the fire.

As Circuit Judge Parker held in *Southern Ry Co. v. South Carolina Public Service Commission,* 31 F. Supp. 707, 715, 716:

> "Congress dealt with the burden on interstate commerce resulting from state requirements of service by authorizing the abandonment of all service on any line or part of a line, where the Interstate Commerce Commission after giving consideration to the public interest determines. On the principle *expressio unius est exclusio alterius,* this is clear indication not to interfere with the power of the states to require service in cases where there is no abandonment pursuant to the statute. * * * Especially is this true in light of the fact that 'it has become the settled social policy both of the states and the nation to entrust the type of public interest here in question to expert administrative agencies because of "the notion," * * * "That a judge is not qualified for such duties." *Palmer v. Comconwealth of Massachusetts, supra*' ". (308 U. S. 79.)

See also *People of the State of New York ex rel. New York & Queens Gas Co. v. McCall et al., Commissioners, supra,* 245 U. S. 345, 351.

It is respectfully submitted that the holding of the State Court on the evidence that the order of the Public Service Commission was not arbitrary or unreasonable, and that it did not cast an undue burden on interstate commerce, was proper.

Point 3. The provision in the order of the Public Service Commission of South Carolina that passenger train service be inaugurated to and from the restored station merely stated a legal incident of the re-activation of the station after its restoration for use as such.

The petitioner treats the portion of the Public Service Commission's order reading "and thereafter to inaugurate passenger train service thereto and therefrom" (R. 131)

as either an attempt to regulate train operations or as a finding of the need therefor. It clearly is neither.

The trains now operating to and from the petitioner's North Station (some six miles from the City of Charleston), as an interim disposition because of the fire damage to the Charleston Union Station (R. 457), will necessarily resume operation to and from the restored station upon completion of the restoration. No authority to abandon such operations has been obtained or sought by either the petitioner or the Southern Railway Company. Hence the provision that passenger train service be inaugurated to and from the restored station, after its restoration for use as such, merely stated a legal incident of the re-activation of the station.

The State Court so regarded the provision. In its opinion, it is said:

> "The inauguration of train service to and from the restored union station clearly has reference to the trains now in service which used the station at the time of the fire, authority to discontinue the operation of which to the station has not been sought or obtained. What additional amount of train service may be required to use the station after its restoration will depend upon action of the regulatory commissions upon a showing of the necessity for more passenger train service at that point." (R. 144.)

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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